

GOMEZ-PEREZ v. POTTER, Postmaster General

\_\_\_ US \_\_\_ (May 27, 2008)

**Justice ALITO delivered the opinion of the Court**

The question before us is whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 633a(a). We hold that such a claim is authorized.

I

Petitioner Myrna Gomez-Perez was a window distribution clerk for the United States Postal Service . . . .

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[Gomez-Perez filed] . . . this action in the United States District Court for the District of Puerto Rico, claiming, among other things, that respondent [United States Postmaster General] had violated the federal-sector provision of the ADEA, by retaliating against her for filing her equal employment opportunity age discrimination complaint . . . . [The Postmaster General argued] that the ADEA federal-sector provision does not reach retaliation. The District Court granted summary judgment in favor of [the Postmaster General] . . . .

On appeal, the United States Court of Appeals for the First Circuit held . . . that the federal-sector provision's prohibition of "discrimination based on age," does not cover retaliation, creating a split among the Courts of Appeals. We granted certiorari.

II

The federal-sector provision of the ADEA provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." The key question in this case is whether the statutory phrase "discrimination based on age" includes retaliation based on the filing of an age discrimination complaint. We hold that it does.

In reaching this conclusion, we are guided by our prior decisions interpreting similar language in other antidiscrimination statutes. [The Court first discusses *Sullivan v. Little Hunting Park, Inc.*, a case concluding that statute a prohibiting racial discrimination extended to retaliation based on race] . . . .

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More recently, in *Jackson v. Birmingham Bd. of Ed.*, . . . . a public school teacher, sued his school board under Title IX, "alleging that the Board retaliated against him because he had complained about sex discrimination in the high school's athletic program." Title IX provides in relevant part that "[n]o person in the United States shall, *on the basis of sex*, . . . be subjected to *discrimination* under any education program or activity receiving Federal financial assistance." Holding that this provision prohibits retaliation, we wrote:

Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination . . . .

\* \* \*

. . . [Therefore], we interpret the ADEA federal-sector provision's prohibition of "discrimination based on age" as likewise proscribing retaliation. The statutory language at issue here ("discrimination based on age") is not materially different from the language at issue in *Jackson* (discrimination "on the basis of sex") . . . . And the context in which the statutory language appears is the same in all three cases; that is, all three cases involve remedial provisions aimed at prohibiting discrimination.

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#### IV

##### A

In arguing that § 633a(a) does not encompass retaliation claims, respondent relies principally on the presence of a provision in the ADEA specifically prohibiting retaliation against individuals who complain about age discrimination in the private sector, § 623(d), and the absence of a similar provision specifically prohibiting retaliation against individuals who complain about age discrimination in federal employment. According to respondent, "the strong presumption is that [the] omission reflects that Congress acted intentionally and purposely in including such language in *Section 623* of the Act and excluding it from *Section 633a*."

"[N]egative implications raised by disparate provisions are strongest" in those instances in which the relevant statutory provisions were "considered simultaneously when the language raising the implication was inserted." Here, the two relevant provisions were not considered or enacted together. *Section 623(d)*, which specifically prohibits private sector retaliation, was enacted in 1967, but the federal-sector provision, § 633a, was not added until 1974.

Respondent's argument is also undermined by the fact that the prohibitory language in the ADEA's federal-sector provision differs sharply from that in the corresponding ADEA provision relating to private-sector employment. In the private-sector provision, Congress set out a specific list of forbidden employer practices. The omission from such a list of a specific prohibition of retaliation might have been interpreted as suggesting that Congress did not want to reach retaliation, and therefore Congress had reason to include a specific prohibition of retaliation, § 623(d), in order to dispel any such inference.

The ADEA federal-sector provision, however, was not modeled after § 623(d) and is couched in very different terms. The ADEA federal-sector provision was patterned "directly after" Title VII's federal-sector discrimination ban. Like the ADEA's federal-sector provision, Title VII's federal-sector provision, contains a broad prohibition of "discrimination," rather than a list of specific prohibited practices . . . .

. . . . Thus, because §§ 623(d) and 633a were enacted separately and are couched in very different terms, the absence of a federal-sector provision similar to § 623(d) does not provide a sufficient reason to depart from the reasoning of *Sullivan* and *Jackson*.

##### B

We see even less merit in respondent's reliance on § 633a(f), which provides that personnel actions by a federal department, agency, or other entity covered by § 633a "shall not be subject to, or affected by, any provision of this chapter" other than §§ 633a . . . . Respondent contends that recognizing federal-sector retaliation claims would be tantamount to making § 623(d) applicable to federal-sector employers and would thus contravene § 633a(f).

This argument is unsound because our holding that the ADEA prohibits retaliation against federal-sector employees is not in any way based on § 623(d). Our conclusion, instead, is based squarely on § 633a(a) itself, "unaffected by other sections" of the Act.

### C

Respondent next advances a complicated argument . . . . After Title VII was made applicable to federal employment in 1972, the Civil Service Commission issued new regulations that prohibited discrimination in federal employment based on race, color, religion, sex, and national origin (but not age), as well as "reprisal[s]" prompted by complaints about such discrimination. When Congress enacted the ADEA's federal-sector provisions in 1974, respondent argues, Congress anticipated that the enactment of § 633a would prompt the Civil Service Commission to "extend its existing reprisal regulations" to cover age discrimination complaints and that Congress intended for the civil service process to provide the exclusive avenue for asserting retaliation claims . . . .

Respondent cites no direct evidence that Congress actually took this approach . . . . And . . . respondent's argument contradicts itself. If, as respondent maintains, "[s]ection 633a(a) does not confer an anti-retaliation right," then there is no reason to assume that Congress expected the Civil Service Commission to respond to the enactment of § 633a(a) by issuing new regulations prohibiting retaliation. On the contrary, if, as respondent maintains, Congress had declined to provide an anti-retaliation right, then Congress presumably would have expected the Civil Service Commission to abide by that policy choice.

### D

Respondent's final argument is that principles of sovereign immunity "require that *Section 633a(a)* be read narrowly as prohibiting substantive age discrimination, but not retaliation." Respondent contends that . . . the only provision that waives sovereign immunity for ADEA claims is contained in § 633a, and therefore this waiver provision "must be construed strictly in favor of the sovereign."

Respondent is of course correct that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign." But . . . . Unlike § 633a(c), § 633a(a) is not a waiver of sovereign immunity; it is a substantive provision outlawing "discrimination." That the waiver in § 633a(c) applies to § 633a(a) claims does not mean that § 633a(a) must surmount the same high hurdle as § 633a(c). . . .

\* \* \*

For these reasons, we hold that § 633a(a) prohibits retaliation against a federal employee who complains of age discrimination. The judgment of the Court of Appeals is reversed, and this case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join as to all but Part I, dissenting.**

. . . Protection against discrimination may include protection against retaliation for complaining about discrimination, but that is not always the case. The separate treatment of each in the private-sector provision of the ADEA makes that clear. In my view, the statutory language and structure, as well as the fact that Congress has always protected federal employees from retaliation through the established civil service process, confirm that Congress did not intend those employees to have a separate judicial remedy for retaliation under the ADEA. I respectfully dissent.

I

\* \* \*

While I take from *Sullivan* and *Jackson* the proposition that broad bans on discrimination, standing alone, may be read to include a retaliation component, the provision at issue here does not stand alone . . . . Here the text and structure of the statute, the broader statutory scheme of which it is a part, and distinctions between federal- and private-sector employment convince me that § 633a(a) does not provide a cause of action for retaliation.

II

. . . . If, as the majority holds, the ban on "discrimination based on age" in § 633a(a) encompasses both discrimination and retaliation claims, it is difficult to understand why Congress would have felt the need to specify in § 623 separate prohibitions against *both* "discriminat[ion]" "because of [an] individual's age," *and* retaliation.

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III

But *why* would Congress allow retaliation suits against private-sector and state employers, but not against the Federal Government? The answer is that such retaliation was dealt with not through a judicial remedy, but rather the way retaliation in the federal workplace was typically addressed -- through the established civil service system, with its comprehensive protection for Government workers. Congress was quite familiar with that detailed administrative system . . . . The resulting system often requires remedies different from those found to be appropriate for the private sector. . .

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**JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.**

I join all but Part I of THE CHIEF JUSTICE's dissent. I write separately to reiterate my view that *Jackson v. Birmingham Bd. of Ed.* incorrectly conflated the concepts of retaliation and discrimination . . . .